



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
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[NAME REDACTED])	ISCR Case No. 20-02386
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicholas Temple, Esquire, Department Counsel
For Applicant: Daniel P. Meyer, Esquire

10/06/2022

Decision

HOGAN, Erin C., Administrative Judge:

On March 18, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (hereafter referred to as CAF) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H, Drug Involvement. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented within the Department of Defense on June 8, 2017.

On July 16, 2021, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 23, 2021. The case was assigned to another administrative judge on March 18, 2022. The case was transferred to me on June 14, 2022. On July 14, 2022, a Notice of Microsoft Teams Video Teleconference Hearing was scheduled for August 16, 2022, at 10 am. The hearing was held as scheduled. During the hearing, the Government offered two exhibits which were admitted as Government (Gov) Exhibits 1 - 2. Applicant testified, and offered six exhibits which were admitted as Applicant Exhibits (AE) A – F, without objection. The transcript was received on August 25, 2022. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

Findings of Fact

Applicant is a 42-year-old employee for a DOD contractor who seeks a security clearance. He has been employed with the DOD contractor for 17 years. This is his first time applying for a security clearance. He was asked by his employer to submit a security clearance application so he can work on classified projects. His highest level of education is a Master's Degree. He is in a long-term relationship. He and his significant other live with their son, age 20 months. (Tr.16-19; Gov 1) (Note: The facts in this decision do not specifically describe employment, names of witnesses, or locations in order to protect Applicant's and his family's privacy. The cited sources contain more specific information.)

Under the drug involvement concern, the SOR alleged Applicant used marijuana with varying frequency from January 1999 to at least January 2020. (SOR ¶ 1.a: Gov 1, Section 23 at 30) The SOR also alleges Applicant intends to use marijuana in the future. (SOR ¶ 1.b: Gov 1, Section 23 at 30). In his response to the SOR, Applicant admitted the allegation in SOR ¶ 1.a but “. . . with amplifying evidence of mitigating conditions having been met in the attached written reply, with exhibits. He denies SOR ¶ 1.b again stating he has “amplifying evidence of mitigating conditions having been met.” (Response to SOR)

Applicant voluntarily disclosed his past marijuana use to the Government during his security clearance background investigation. On his security clearance application, dated March 27, 2020, Applicant indicated that he used marijuana in response to Section 23 – Illegal Use of Drugs or Drug Activity. He estimated that he used marijuana from January 1999 to January 2020. He listed the nature and frequency of the marijuana use as “Recreational, perhaps less than 10 times per year.” (Gov 1. Section 23 at 30)

During the hearing Applicant testified that he started using marijuana in college. His use was more frequent during his college years. After college, his marijuana use was not as frequent. Years would pass where he did not use marijuana. He used marijuana in group settings where marijuana was offered to him. He never purchased marijuana. He testified that he listed that he used marijuana “perhaps less than 10 times per year” in order to cover all of the instances of his marijuana use. He did not want to be accused of under-reporting his marijuana use. In the summary of his background investigation interview, the investigator states that, “Subject confirmed that he smoked ten times per year from 1999 to January 2020, which he described as infrequent.” This summary of the background investigation interview was prepared by the interviewer. (Gov 2) Applicant did not have an opportunity to review the statement for accuracy. He did not have the opportunity to swear that the statement is an accurate representation of what occurred during the interview. Instead, it is an unsworn summary of what the investigator claims transpired during the interview. Paragraph E3.1.17 of the Directive states DOD personnel background reports of investigation cannot be received without an authenticating witness. While Applicant did not object to Gov 2, I give Gov 2 less weight because it is unsworn and unauthenticated.

On his March 2020 security clearance application, Applicant wrote the following response to the question about his intentional future use of marijuana: "Recreational marijuana, as desired, with similar frequency as noted above, if at all." Applicant testified that what he meant by this answer is that he may possibly use it in the future for example, should marijuana become legal in the future. (Gov 1, section 23 at 30) The unsworn summary of Applicant's background investigation interview mentioned that when asked about his plans for future use of marijuana, Applicant said it was possible, maybe. The investigator asked him about future use if it affected his security clearance as well as it being illegal under state and federal law. Applicant replied that he has no problem with not using marijuana. His past marijuana use had no negative affect on his personal and professional life.

Applicant testified his last use of marijuana was over the July 4th weekend in 2019. He and his wife were out of town visiting friends. Someone passed around a marijuana joint during a gathering and Applicant used it. Prior to that, he recalls his last use of marijuana was in December 2016. He did not use for a period of years before 2016. He estimated he used marijuana perhaps in 2010 or 2012. (Tr. 32, 39) On his March 2020, security clearance application, Applicant estimated his last use of marijuana was in January 2020. Applicant testified he does not recall using in January 2020, but the answers on his security clearance application may be more reliable than his present memory. This was his first time completing a security clearance application and he was providing an estimate. He was trying to be as truthful as possible. (Tr. 34 - 37)

Applicant testified that during his subsequent background investigation interview, the interviewer did not ask about specific dates. The investigator wrote in his unsworn summary of the interview: "Subject confirmed that he has smoked marijuana about ten times per year from 1999 to January 2020, which he described as infrequent." (Gov 2) Applicant testified: "That was his interpretation from our phone conversation. So he transcribed that. I did not make that exact statement." (Tr.47) Under cross-examination, Department Counsel mentioned that Applicant was providing a different answer. Applicant replied:

Okay, I cannot - - I would say that I cannot recall the exact statement that I would have made vocally to him on the phone, and the only evidence to refer back to that is what he put on there. But I do not necessarily agree with the that exact vernacular that's used in that statement, and that is something that I could clarify. So had I had - had I read this - - And by the way, also this occurred before I sought any counsel. I didn't really understand what - - about the whole process there, but had I read this and had the opportunity to have follow-up conversation with this interviewer, I would have enjoyed the opportunity to clarify some of these statements. (Tr. 47)

On April 2, 2021, Applicant signed a Statement of Intent declaring that he will not illegally use any drugs, to include marijuana in the future. He acknowledged that any future use of illegal drugs shall constitute grounds for revocation of his security clearance. (AE E).

On April 12, 2021, Applicant was seen by Dr. J.C., a psychiatrist, for a tele-video visit. The appointment lasted one hour. Applicant told Dr. J.C. that he first used marijuana in college in 1999. Some years he did not use at all, other years he used less than 10 times a year. He reported his use decreased over time since college, and was always sporadic. He only used in social situations when it was offered to him. He never purchased marijuana. He denied his marijuana usage created legal, health, social, employment or financial issues. He denies cravings, withdrawal symptoms, or tolerance related to marijuana use. He has never used marijuana at work or before work and has never been under the influence of marijuana at work. He denies significant alcohol use. He drinks socially and has on average 1-2 glasses of wine a week. He mentioned his newborn son has health problems. As a result, he has no desire to engage in substance abuse and is focused on healthy lifestyle changes. He denies ever being treated for substance abuse. (AE E at 2-3)

Dr. J.C. concludes that based on Applicant's reported history of cannabis use, he does not meet DSM-5 diagnostic criteria for a substance use disorder. She notes he reported not using cannabis since late 2019 and has no plans to use marijuana in the future. He is focused on a healthy lifestyle, caring for his family and newborn and progressing in his career. She recommends no further treatment because he shows no current or history of clinically significant distress or social/occupational/financial/health impairment related to cannabis use or other substance use. (AE E at 3)

On May 3, 2021, and August 5, 2022, Applicant submitted samples of his urine to test for illegal drugs, to include marijuana. Both samples tested negative. (AE E at 4-5)

Whole-Person Factors

Applicant's significant other provided a statement on his behalf. She met Applicant in 2018. She currently lives with him and their infant son. She describes Applicant as "exceptionally well-reasoned, responsible, and trustworthy." They recently purchased a home. When their son was born five weeks early in December 2020, Applicant advocated for their son when he was in the hospital. He fed and cared for their son when he was so small that he could hold him in the palm of his hand. She moved in with Applicant in January 2020. The last time she recalls seeing Applicant use marijuana was at a party over the 4th of July weekend in 2019. She states Applicant wants to remove himself entirely from situations where people may be using illegal substances or drinking alcohol heavily. Applicant's resolve has only strengthened since the birth of their son. He is dedicated to being an exceptional role model for their son and she is confident that he will not use marijuana in the future. (AE D at 11-13). Six of Applicant's close friends and colleagues provided letters attesting to his character, trustworthiness, and integrity. (AE D at 1-6, 14-18).

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially

disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

DOD and Federal Government Policy on Marijuana Use

On October 25, 2014, the Director for National Intelligence, issued a memorandum titled, "Adherence to Federal Laws Prohibiting Marijuana Use" addressing concerns raised by the decriminalization of marijuana use in several states and the District of Columbia. The memorandum states that changes to state and local laws do not alter the existing National Security Adjudicative Guidelines. "An individual's disregard for federal law pertaining the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations."

On May 26, 2015, the Director of the United States Office of Personnel Management (OPM) issued a memorandum titled, "Federal Laws and Policies Prohibiting Marijuana Use." The Director of OPM acknowledged that several jurisdictions have decriminalized the use of marijuana, allowing the use of marijuana for medicinal purposes and/or for limited recreational use but states that Federal law on marijuana remains unchanged. Marijuana is categorized as a controlled substance under Schedule I of the Controlled Substances Act. Thus knowing or intentional marijuana possession is illegal, even if the individual has no intent to manufacture, distribute, or dispense marijuana.

On December 21, 2021, the Director of National Intelligence signed the memorandum, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the "whole-person concept" stated under SEAD 4, to determine whether the applicant's behavior raises a security concern that has not been mitigated.

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription drug and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

The guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions potentially apply to Applicant's case.

AG ¶ 25(a) any substance misuse;

AG ¶ 25(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(g) expressed intent to continue illegal drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The SOR alleges and Applicant admits he used marijuana on various occasions from 1999 to January 2020. He used marijuana on a regular basis during college. His marijuana use tapered off upon his graduation from college when Applicant began to focus on his career. There were periods of years where he did not use marijuana. Applicant admits to using marijuana sporadically over the years after college. During the hearing, he recalled his last use being on July 4, 2019. He indicated on his security clearance application that his last use was in January 2020. AG ¶ 25(a) applies. Applicant did not cultivate, purchase, or distribute marijuana. He did possess marijuana when he used the marijuana. Based on this reason, AG ¶ 25(c) applies.

I find AG ¶ 25(g) does not apply because Applicant's response on his security clearance application regarding future marijuana use did not expressly state that he intended to use marijuana in the future. His answer appeared to be more of a guess. "Recreational marijuana, as desired with similar frequency as noted above, if at all." It is not a strong enough statement to verify that Applicant had definite intent to use marijuana in the future. The phrase, ". . . if at all", makes it seem unlikely that he would use marijuana in the future. His testimony during the hearing reinforced this notion.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions apply to the Applicant's case:

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

AG ¶ 26(a) applies because Applicant's last use of marijuana occurred close to three years ago. Applicant disclosed his last marijuana use on his March 2020 security clearance application as January 2020. He put the word "estimated" in parentheses. Although Applicant's answers about his last use of marijuana varied in responses on his security clearance application and testimony at hearing, I find the various discrepancies to be minimal. It is important to note that Applicant clearly indicated that these dates were estimates. He chose to provide a broad overview of his marijuana use because he did not want the government to think he was lying about his marijuana use. I find Applicant was honest and forthright about his past illegal marijuana use. While his illegal marijuana use showed extremely poor judgment, Applicant's circumstances have changed a lot over the past few years. He and his significant other became parents and purchased a house. Applicant's current focus is on his family and career. This is his first time applying for a security clearance. During the process, which he found confusing, Applicant learned that marijuana use is not consistent with holding a security clearance. It is unlikely he will use marijuana in the future.

AG ¶ 26(b) applies. Applicant recalled at hearing his last use of marijuana was in July 2019. Since that time, his priorities have changed. He became a father. He and his significant other are focused on staying healthy for their son. He avoids social situations where people are using marijuana. Applicant provided a signed statement of intent to refrain from all illegal drug involvement and substance misuse indicating that any violation could result in the revocation of his security clearance. Applicant was forthcoming about his marijuana use on his security clearance application and during the hearing. He demonstrated an appropriate period of abstinence. While Applicant used marijuana over a period of 20 years, he was never a habitual marijuana user, only using when it was offered to him at parties. His use was highest during college. There were years where Applicant did not use marijuana. Dr. J.C.'s substance abuse evaluation indicates Applicant's history of past marijuana use raised no significant issues and recommended no further treatment.

Applicant met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

There are reasons that support not granting a security clearance to Applicant. Questions are raised about Applicant's judgment because of his admitted illegal use of marijuana over a 20-year-period. I find the mitigating reasons outweigh the disqualifying reasons in Applicant's case. He disclosed his marijuana use on his security clearance application, which supports that he is trustworthy. He stopped using marijuana in either July 2019 or January 2020 and has not used marijuana for close to three years. He signed a statement of intent to refrain from all drug involvement and substance misuse and acknowledged that any future substance misuse could result in the revocation of his security clearance. Applicant has built a successful career and is highly regarded among his peers. His current priorities are focused on his family, staying healthy, and providing a good example to his young son.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has learned a significant lesson. While his marijuana use showed poor judgment, he disclosed his marijuana use during the security clearance process. He learned from his mistake in judgment and took steps to demonstrate his intent to refrain from illegal marijuana use. Applicant is aware that should he illegally use marijuana in the future, it is likely that his security clearance will be revoked. Concerns raised by Applicant's illegal marijuana use are mitigated.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ERIN C. HOGAN
Administrative Judge